

The opinion in support of the decision being entered today
is *not* binding precedent of the Board.

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte HERBERT EICHENAUER, BERND URBANNECK,
THOMAS ECKEL, and ECKHARD WENZ

Appeal 2007-4306
Application 10/721,127
Technology Center 1700

Decided: September 26, 2007

Before CHUNG K. PAK, CATHERINE Q. TIMM, and
JEFFREY T. SMITH, *Administrative Patent Judges*.

SMITH, *Administrative Patent Judge*.

DECISION ON APPEAL

This is an appeal under 35 U.S.C. § 134 from a final rejection of
claims 1-25. We have jurisdiction under 35 U.S.C. § 6.

WE AFFIRM.

Claim 1 is illustrative:

1. A thermoplastic molding composition comprising:

- (A) at least one polymeric resin selected from the group consisting of polycarbonate, polyester carbonate, polyamide, polyalkylene terephthalate and polyoxymethylene; and
- (B) a co-precipitated mixture of,
 - (i) a graft polymer B.1 that is prepared by means of a redox initiation system consisting of,
 - an oxidizing agent selected from the group consisting of di-tert.-butyl peroxide, cumene hydroperoxide, dicyclohexyl percarbonate, tert.-butyl hydroperoxide, p-menthane hydroperoxide, H₂O₂ and combinations thereof, and
 - a reducing agent selected from the group consisting of salts of sulfinic acid, salts of sulfurous acid, ascorbic acid, and salts of ascorbic acid, sodium formaldehyde sulfoxylate, monohydroxyacetone, dihydroxyacetone, sugars, iron(II) salts, tin(II) salts, titanium(III) salts and combinations thereof, and
 - (ii) a graft copolymer B.2 that is prepared by means of an initiation system consisting of persulfate compounds.

The Examiner relies upon the following references:

Kempner
Van der Helder

US 5,276,092
WO 00/06648

Jan. 4, 1994
Feb. 10, 2000

Appealed claims 1-25 stand rejected as unpatentable under 35 U.S.C. § 103(a) over Kemper in view of Van der Helder.¹

Appellants have not disputed that Kemper discloses a co-precipitated mixture of core/shell polymers that can be produced from initiation systems comprising redox initiators and/or persulfate compounds.² Rather, Appellants contend:

No criticality relative to the compositional makeup of the initiator system is disclosed or suggested, and nothing in the reference point to any advantage attributed to one initiator over the others nor to the advantageous performance attained upon the combination of initiators, key to the present invention.

(Br. 4).

Although Kemper does not exemplify mixtures of co-precipitated core/shell polymers, one core/shell polymer prepared from a redox initiation system, and a second core/shell polymer prepared from an initiation system comprising persulfate compounds, in the formation of a thermoplastic molding composition, we are in complete agreement with the Examiner's determination that the reference provides the requisite motivation, suggestion, and teaching to use more than one initiation system in the formation of a thermoplastic molding composition, thus suggesting that the mixture would also be useful for the very same purpose. *In re Kerkhoven*,

¹ Appellants have not presented arguments directed to all the rejected claims. We select claim 1 as representative of the rejected claims. The Examiner cited Van der Helder to address the claims that required a flame retardant. Claim 1 does not require such a component.

² Appellants have not argued that the core/shell polymers of Kemper are not a graft copolymers (See Brief generally).

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626 F.2d 846, 850, 205 USPQ 1069, 1072 (CCPA 1980); *In re Susi*, 440 F.2d 442, 445, 169 USPQ 423, 426 (CCPA 1971).

We now turn to the evidence presented in the Specification. Appellants contend that the examples in the Specification exhibit the advantageous surface properties of the inventive composition based upon the claimed initiator systems (Br. 4).

The question as to whether unexpected advantages have been demonstrated for the claimed subject matter is a factual question. *See In re Johnson*, 747 F.2d 1456, 1460, 223 USPQ 1260, 1263 (Fed. Cir. 1984). Thus, it is incumbent upon the Appellants to supply the factual basis to rebut the prima facie case of obviousness established by the Examiner. *See, e.g., In re Klosak*, 455 F.2d 1077, 1080, 173 USPQ 14, 16 (CCPA 1972). In this regard, Appellants' position that the evidence in the Specification establishes unexpectedly improved results is not persuasively explained or substantiated on this record for a number of reasons.

First, the Appellants' showing of unexpected results does not provide a comparison of the claimed invention with the closest prior art. *See In re Baxter Travenol Labs.*, 952 F.2d 388, 392, 21 USPQ2d 1281, 1285 (Fed. Cir. 1991); *In re De Blauwe*, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed. Cir. 1984). Appellants have failed to indicate which of the examples presented are representative of the Kemper reference.

Second, Appellants allege that the improved surface appearance is due to the combination of initiators. However, the examples only compare compositions from co-precipitated graft polymers B.1.1/B.2.1 in ratios of

75:25 and 50:50 and a single composition from co-precipitated graft polymers B.1.1/B.2.2 in a ratio of 75: 25. This data relied upon by Appellants is not commensurate in scope with the claimed invention which is not so limited. *See In re Greenfield*, 571 F.2d 1185, 1189, 197 USPQ 227, 230 (CCPA 1978) (“Establishing that one (or a *small* number of) species gives unexpected results is inadequate proof, for ‘it is the view of this court that objective evidence of non-obviousness must be commensurate in scope with the claims which the evidence is offered to support.’” (*quoting In re Tiffin*, 448 F.2d 791, 792, 171 USPQ 294, 294 (CCPA 1971))). Appellants tested only a few compositions, as exhibited in the examples. However, the claims on appeal are much broader.

Third, Appellants have failed to point to evidence indicating the results in the data presented in the Specification were considered to be unexpected to one of ordinary skill in the art. “It is well settled that unexpected results must be established by factual evidence. Mere argument or conclusory statements in the specification does not suffice.” *In re Soni*, 54 F.3d 746, 750, 34 USPQ2d 1684, 1687 (Fed. Cir. 1995) (*quoting In re De Blauwe*, 736 F.2d 699, 705, 222 USPQ 191, 196 (Fed.Cir.1984)). The question here, we emphasize, is a question of evidence and the burden is on the Appellants to show unexpected results. *In re Johnson*, F.2d at 1460, USPQ at 1263. In our view, Appellants have not shouldered their burden.

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In conclusion, based on the foregoing and the reasons well stated by the Examiner, the Examiner's decision rejecting the appealed claims is affirmed. The decision of the Examiner is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED

clj

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